

Montana Water Court
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FILED
02/28/2023
Sara Calkins
CLERK
Montana Water Court
STATE OF MONTANA
By: D'Ann CIGLER
43B-1005-R-2021
Block, Nathaniel
14.00

MONTANA WATER COURT, YELLOWSTONE DIVISION
YELLOWSTONE RIVER ABOVE AND INCLUDING BRIDGER CREEK BASIN
BASIN 43B
PRELIMINARY DECREE

CLAIMANTS: Eight Mile II LLC; Montana Land & Cattle Co.

CASE 43B-1005-R-2021

43B 190421-00

43B 190422-00

43B 190423-00

43B 190429-00

43B 190431-00

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER'S REPORT

FINDINGS OF FACT

1. The above-captioned claims appeared in the Preliminary Decree for the Yellowstone River, Above and Including Bridger Creek Basin, (Basin 43B) with issue remarks.
2. On January 29, 2021, the above-captioned claims were consolidated into Water Court Case 43B-1005-R-2021. On December 15, 2021, this Court ordered the claimant to work with the DNRC to resolve the issue remarks on the claims.
3. On February 24, 2022, the DNRC filed a Memorandum detailing several modifications that would resolve the issue remarks. On July 28, 2022, Eightmile Creek PV Ranch, LLC ("Eightmile") filed a Response to Order Setting Filing Deadline stating that Eightmile had purchased Claimant Eight Mile II, LLC's ranch and attached a Warranty Deed showing the same and agreed with the DNRC's proposed changes. On August 5, 2022, Montana Land & Cattle Co. filed a Response agreeing with the DNRC's proposed changes.
4. Pursuant to the Memorandum, the means of diversion for claim 43B 190421-00 should be modified to 'Dam'. The Memo further recommended the removal of the issue remarks on the claim.
5. The Memo recommended the removal of the issue remarks appearing on claim 190422-00. The Memo additionally recommended that the claim be modified as follows:

Point of Diversion and Means of Diversion:

<u>ID</u>		<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			NENENW	5	5S	8E	PARK
Period of Diversion:		JANUARY 1 TO DECEMBER 31					
Diversion Means:		INSTREAM DAM					
Reservoir:		ON STREAM		Reservoir Name:		UPPER POND	
		<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
			NENENW	5	5S	8E	PARK
Diversion to Reservoir:		DIVERSION # 1					
Period of Use:		JANUARY 1 to DECEMBER 31					
Place of Use:							
<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			NENENW	5	5S	8E	PARK

Replace: S2SWSE
 Add: Dam Height: 13.0 Feet
 Depth: 10.0 feet
 Surface Area: 0.44 acres
 Current Capacity: 1.76 ac-ft

6. Pursuant to the Memorandum, the flow rate for claim 43B 190423-00 should be

modified to the originally claimed 10 gpm and the flow rate remark should be removed.

7. Pursuant to the Memorandum, the issue remark on claim 43B 190429-00 should be removed. Additionally, the Means of Diversion should be clarified as follows:

Diversion Means:

~~DIKE~~ HEADGATE W/DITCH OR PIPELINE / FLOOD AND DIKE

8. Pursuant to the Memorandum, the issue remarks on claim 43B 190431-00 should be removed.

PRINCIPLES OF LAW

1. The Montana Water Court has the authority to determine the extent of all water rights in the state as they existed prior to July 1, 1973. *Fellows v. Saylor*, 2016 MT 45, ¶ 25, 382 Mont. 298, 367 P.3d 732; §§ 85-2-233, -102(13), MCA.

2. A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content. § 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that the elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973. This is the burden of proof for every assertion that a claim is incorrect. Rule 19, W.R.Adj.R.

3. A claimant may move to amend their water right claim so that the claim more accurately represents historical use. Section 85-2-233, MCA; Rule 10, W.R.Adj.R. Notice to other water right owners may be required if the amendment would adversely affect other water rights. 85-2-233(6)(a)(i). Claimants wishing to amend their claim must overcome the prima facie status of the claim by a preponderance of the evidence. Section 85-2-227, MCA; Rule 19, W.R.Adj.R. A preponderance of the evidence is evidence that shows a fact is “more probable than not.” *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628.

CONCLUSION OF LAW

1. Pursuant to the recommendations in the Memorandum, the issue remarks should be removed from the claims. The claims should be modified as discussed in the Memorandum to reflect historical use. Modification of the claims does not appear to

adversely affect other water rights.

RECOMMENDATION

1. Upon review the record in this case, the above-captioned claims should be modified as discussed above. The issue remarks should be removed from the claims.

Post Decree Abstracts of Water Right Claims are attached to this Master's Report for review.

ELECTRONICALLY SIGNED AND DATED BELOW.

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Note: Service List Updated 2-23-2023

WATER COURT
ABSTRACT OF WATER RIGHT CLAIM
YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK
BASIN 43B

Water Right Number: 43B 190421-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: EIGHTMILE CREEK PV RANCH LLC
8111 WESTCHESTER DR STE 900
DALLAS, TX 75225 6146

Priority Date: DECEMBER 21, 1971

Type of Historical Right: USE

***Purpose (use):** STOCK
THIS WATER RIGHT IS INCIDENTALLY USED FOR FISH AND WILDLIFE

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED FOR THIS USE FROM THIS ONSTREAM RESERVOIR.

Volume: THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

***Source Name** EIGHTMILE CREEK
Source Type: SURFACE WATER

***Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SESESE	32	4S	8E	PARK

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: INSTREAM

Reservoir: ONSTREAM **Reservoir Name:** LOWER POND

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	SESESE	32	4S	8E	PARK

Diversion to Reservoir: DIVERSION # 1

Dam Height: 13.00 FEET

Depth: 10.00 FEET

Surface Area: 0.88 ACRES

Capacity: 3.52 ACRE-FEET

THE CAPACITY, DAM HEIGHT, MAXIMUM DEPTH AND SURFACE AREA HAVE BEEN ESTIMATED BY DNRC.

Period of Use: JANUARY 1 TO DECEMBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			SESESE	32	4S	8E	PARK

WATER COURT
ABSTRACT OF WATER RIGHT CLAIM
YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK
BASIN 43B

Water Right Number: 43B 190422-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: EIGHTMILE CREEK PV RANCH LLC
8111 WESTCHESTER DR STE 900
DALLAS, TX 75225 6146

Priority Date: DECEMBER 31, 1971

Type of Historical Right: USE

***Purpose (use):** STOCK
THIS WATER RIGHT IS INCIDENTALLY USED FOR FISH AND WILDLIFE

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED FOR THIS USE FROM THIS ONSTREAM RESERVOIR.

Volume: THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

***Source Name** EIGHTMILE CREEK
Source Type: SURFACE WATER

***Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		S2SWSE	5	5S	8E	PARK

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: DAM

Reservoir: ONSTREAM **Reservoir Name:** UPPER POND

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	S2SWSE	5	5S	8E	PARK

Diversion to Reservoir: DIVERSION # 1

Dam Height: 13.00 FEET

Depth: 10.00 FEET

Surface Area: 0.44 ACRES

Capacity: 1.76 ACRE-FEET

Period of Use: JANUARY 1 TO DECEMBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			S2SWSE	5	5S	8E	PARK

WATER COURT
ABSTRACT OF WATER RIGHT CLAIM
YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK
BASIN 43B

Water Right Number: 43B 190423-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: EIGHTMILE CREEK PV RANCH LLC
8111 WESTCHESTER DR STE 900
DALLAS, TX 75225 6146

Priority Date: OCTOBER 8, 1904

Type of Historical Right: DECREED

Purpose (use): STOCK

Flow Rate: 10.00 GPM

Volume: THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

***Source Name** SPRING, WILLS SPRING

Source Type: GROUNDWATER

THIS IS A CLOSED BASIN. THE FIRST DOWN GRADIENT SOURCE IS EIGHT MILE CREEK

***Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NENENW	3	5S	8E	PARK

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: PIPELINE

Period of Use: JANUARY 1 TO DECEMBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			NWSENE	34	4S	8E	PARK
2			NENWNE	35	4S	8E	PARK

WATER COURT
ABSTRACT OF WATER RIGHT CLAIM
YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK
BASIN 43B

Water Right Number: 43B 190429-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: EIGHTMILE CREEK PV RANCH LLC
8111 WESTCHESTER DR STE 900
DALLAS, TX 75225 6146

Priority Date: JULY 1, 1875

Type of Historical Right: DECREED

Purpose (use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 269.00 GPM

***Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 3 - MODERATE

***Maximum Acres:** 505.00

Source Name EIGHTMILE CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SESESE	33	4S	8E	PARK

***Period of Diversion:** APRIL 15 TO OCTOBER 15

Diversion Means: HEADGATE W/DITCH OR PIPELINE/FLOOD AND DIKE

Ditch Name: DARROCH DITCH

***Period of Use:** APRIL 15 TO OCTOBER 15

***Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	30.00		SENW	34	4S	8E	PARK
2	40.00		S2NE	34	4S	8E	PARK
3	30.00		NESW	34	4S	8E	PARK
4	30.00		NWSE	34	4S	8E	PARK
5	45.00		E2SE	34	4S	8E	PARK
6	160.00		SW	35	4S	8E	PARK
7	40.00		S2NW	35	4S	8E	PARK
8	20.00		W2W2SE	35	4S	8E	PARK
9	20.00		N2N2NW	2	5S	8E	PARK
10	15.00		SESE	26	4S	8E	PARK
11	60.00		NE	34	4S	8E	PARK

12	15.00	W2NESE	34	4S	8E	PARK
Total:	505.00					

Remarks:

THIS WATER RIGHT IS SUBJECT TO A PRIVATE AGREEMENT FILED ON 08/22/1990 AND AN ADDENDUM FILED ON 08/07/1991 DESCRIBED IN THE MASTER'S REPORT LOCATED IN THE CLAIM

WATER COURT
ABSTRACT OF WATER RIGHT CLAIM
YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK
BASIN 43B

Water Right Number: 43B 190431-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: MONTANA LAND & CATTLE CO
3896 OLD YELLOWSTONE TRAIL N
LIVINGSTON, MT 59047 8806

EIGHTMILE CREEK PV RANCH LLC
8111 WESTCHESTER DR STE 900
DALLAS, TX 75225 6146

Priority Date: JULY 1, 1875
Type of Historical Right: DECREED
Purpose (use): IRRIGATION
Irrigation Type: SPRINKLER
Flow Rate: 6.25 CFS
***Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.
Climatic Area: 3 - MODERATE
***Maximum Acres:** 505.00
Source Name EIGHTMILE CREEK
Source Type: SURFACE WATER
Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SESESE	33	4S	8E	PARK

***Period of Diversion:** APRIL 15 TO OCTOBER 15
Diversion Means: HEADGATE W/DITCH OR PIPELINE/FLOOD AND DIKE
Ditch Name: DARROCH DITCH

***Period of Use:** APRIL 15 TO OCTOBER 15

***Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	30.00		SENW	34	4S	8E	PARK
2	40.00		S2NE	34	4S	8E	PARK
3	30.00		NESW	34	4S	8E	PARK
4	30.00		NWSE	34	4S	8E	PARK
5	45.00		E2SE	34	4S	8E	PARK
6	160.00		SW	35	4S	8E	PARK
7	40.00		S2NW	35	4S	8E	PARK
8	20.00		W2W2SE	35	5S	8E	PARK
9	20.00		N2N2NW	2	5S	8E	PARK

10	15.00	SESE	26	4S	8E	PARK
11	60.00	NE	34	4S	8E	PARK
12	15.00	W2NESE	34	4S	8E	PARK
Total:	<u>505.00</u>					

Remarks:

THIS WATER RIGHT IS SUBJECT TO A PRIVATE AGREEMENT FILE ON 08/22/1990 AND AN ADDENDUM FILED ON 08/07/1991 LOCATED IN THE MASTER'S REPORT IN THE CLAIM FILE.